

IN THE MATTER OF AN ARBITRATION

BETWEEN:

TEAMSTERS CANADA RAIL CONFERENCE

(the "Union")

- and -

CANADIAN PACIFIC KANSAS CITY RAILWAY

(the "Company")

Heard *via* Zoom on June 15, 2023 at Calgary, Alberta

DISPUTE:

Appeal of the 20 demerits assessed to Conductor Darrell Kaczynski of Regina, SK.

JOINT STATEMENT OF ISSUE:

Following a formal investigation, Mr. Kaczynski was issued 20 demerits described as "In connection with your tour of duty working Regina Yard Assignment KR11, at 0800 January 3, 2021, more specifically your work performance by failing to follow instructions from the Assistant Trainmaster for spotting specific cars to a CP customer facility which caused unnecessary delays in customer service. A violation of CROR General Rule A, items (i) through (ix)."

The parties agree that CROA rules apply, including item 14 of the Memorandum of Agreement Establishing the CROA&DR.

UNION POSITION

The Union contends that the investigation was not conducted in a fair and impartial manner under the requirements of the Collective Agreement. The Union argues the Investigating Officer asked several questions which were outside the scope of the investigation, leading, or speculative (Q. 10-16, 28, 32, 38, 41-46). For this reason, the Union contends that the discipline ought to be removed in its entirety and Mr. Kaczynski be made whole.

The Union contends the Company has failed to meet the burden of proof or establish culpability regarding all of the allegations outlined above. Furthermore, the Union contends the discipline assessed is unjustified, unwarranted, and excessive in all of the circumstances, including mitigating factors evident in this matter including:

- It was not discussed during the initial job briefing that certain cars were designated “must spot”.
- Mr. Kaczynski folded his list over in order to fit it into the switch sleeve, covering the notation “must spot” on the list.
- Mr. Kaczynski took the first 20 cars from the track in order to depart the yard quickly and prevent being blocked by another movement.
- Mr. Kaczynski committed to contacting his supervisor with concerns that may affect switching and customer operations.

With respect to the Company’s objections regarding the alleged vagueness of the Union’s request that the grievor be made whole, the Union’s positions remain unchanged. The Union is prejudiced by these late objections regardless of the fact the matters have been previously decided; *res judicata*.

The Union requests that the discipline be removed in its entirety, and that Mr. Kaczynski is made whole for all associated loss with interest. In the alternative, the Union requests that the penalty be mitigated as the Arbitrator sees fit.

COMPANY POSITION

The Company disagrees and denies the Union’s request.

The Company maintains the Grievor’s culpability as outlined in the discipline letter was established following a fair and impartial investigation as required under the collective agreement. Discipline was determined following a review of all pertinent factors, including those that the Union describes. The Company’s position continues to be that the quantum of discipline assessed was just, appropriate and warranted in all the circumstances.

Based on the foregoing, the Company cannot see a reason to disturb the discipline assessed and requests that the Arbitrator be drawn to the same conclusion.

Without precedent or prejudice to the Company’s aforementioned position, it is incumbent on the Union to provide detailed information on alleged lost wages, benefits and interest. The Company cannot properly respond to this request when the Union is vague and unspecific on what constitutes “made whole”.

FOR THE UNION:

FOR THE COMPANY:

For: Dave Fulton
General Chairperson
Relations
TCRC CTY West

For: Lauren McGinley
Asst. Director, Labour
CPKC Railway

May 26, 2023

Appearances:

For the Company:

D. Zurbuchen Manager, Labour Relations
A. Cake Manager, Labour Relations

For the Union:

E. Carr Counsel, CaleyWray
B. Wiszniak Local Chairperson
D. Edward Vice General Chairperson, CTY-West
D. Fulton General Chairperson, CTY-East
J. Hnatiuk Vice General Chairperson, CTY-West
W. Zimmer Local Chairperson
D. Kaczynksi Grievor

AWARD OF THE ARBITRAOR

I - Background

[1] I was appointed to arbitrate this Grievance under a “Letter Re: Grievance Reduction Initiative & Article 41 Final Settlement of Disputes Without Work Stoppage (Arbitration)”, dated March 21, 2022. The parties agreed to both *Ad Hoc* Arbitration - similar to what is followed by the CROA&DR - and an Informal Expedited Arbitration process. This matter was heard under the *ad hoc* process.

[2] The Grievor is a long-service employee, having been hired by the Company on July 15, 1988. He transferred into the running trades in January 2005. At the time of this incident in January of 2021, he had approximately 32.5 years of service, with 16 of those years in the running trades.

- [3] On January 3, 2021, the Grievor as Foreman and a Yard Helper employee were ordered to work on assignment KR11 out of the Regina Yard.
- [4] A copy of the switchlist given to the Grievor – which set out his work for that day - was entered as evidence. That sheet states that the Grievor was listed to switch cars 5 to 24, with cars 17 to 24 having a notation of “MUST SPOT” to J28 (Plains Midstream) from track RF28.
- [5] The Grievor did not follow these instructions. Instead, he spotted cars 1 to 20, and so did not spot cars 21 to 24. The train then departed the yard. The Assistant Trainmaster (ATM) was only made aware the required cars were not all spotted during a conference call. This resulted in a delay with filling that customer’s requirements.
- [6] On January 10, 2021, an Investigation was conducted. The Grievor was assessed 20 demerits. This Grievance was filed against this discipline.
- [7] For the reasons which follow, the Grievance is dismissed. The discipline was just and reasonable in all of the circumstances.

II - Facts

- [8] A memo written by the ATM was filed as evidence. It is dated January 3, 2021. It indicated that the ATM conducted a “briefing” with the crew on the day in question and that the “list of the cars that were required to be spotted was given to the crew, with the instructions of “MUST SPOT” clearly written.
- [9] The switchlist from that day was also in evidence. A review of that switchlist indicates a bracket beside cars 17 to 24 with the words “must spot”.
- [10] The ATM was questioned as to whether he told the 0800 job briefing that cars 17 to 24 were a “must spot”. His answer was “I definitely said that out loud, yes I did” (Q/A 1, p. 15).
- [11] At Q/A 23, while the Grievor acknowledged that the switch list given to him “said what it said”, he indicated that at the job briefing – as part of his routine – he “automatically folds the sheets in half to fit into the protective plastic sleeve. So when I did this I folded the list in half and put into the sleeve covering the must spot writing”.

[12] In the Investigation, the Union asked the Grievor whether there was any instruction on the job briefing cover page to spot specific cars at Plains Midstream (J28) and the Grievor stated there was not. The Grievor explained he could not recall any discussion at the job briefing that morning about the cars to be spotted. The Union questioned the ATM of why the job briefing form did not indicated advice to the crew about the “must spot cars”. The ATM indicated he stood “by his memo”. The Union took the position this was unresponsive.

[13] The Union filed the folded list as evidence. Handwritten marks are just visible at the fold line, however the actual words “must spot” are not seen as they are behind the fold.

[14] Even folded, the switchlist showed that cars 5 to 24 were to be spotted, which would have included cars 17 to 24. The Grievor did not perform that work. Instead, the Grievor chose to take cars 1 to 20 out of F29 and not cars 5 to 24. The Grievor stated he made the decision to take cars 1 to 20 out of F29 instead of cars 5 to 24 for the following reason:

The sequence 1 to 20 was taken because there was no track to run around time?[sic] There was a small window of opportunity to depart the yard. Or we would have been blocked by trains for several hours. That would have resulted in a known failure to spot at spectra”.

[15] The Grievor also stated he was “looking at the list and did not recognize the must spot cars 17 through 24. The Grievor also stated he “took the first 20 cars due to the train traffic volume”. (Q/A 35). He also stated at Q/A 36 that “unknowingly cars 17 to 24 were a must spot...”

[16] The ATM indicated he was never told the cars were not spotted as requested. The Grievor did not tell the ATM there was only a small window of opportunity, or that cars 19 to 24 were not going to make that days’ spot and did not make that days’ spot. He does not recall if he at any time discussed an alternative with the ATM, to all the switching he had to do. He confirmed he did not advise the ATM that there would be an issue with getting the requested cars switched out and spotted to the customer as requested. He noted that in the future he will “contact the ATM with any issues” (Q/A 36).

[17] The Grievor indicated he did not at the time think he was being insubordinate by taking different cars than instructed, but at the Investigation he did realize that he was.

[18] The Grievor also indicated he did not realize the impact on the customer from not spotting the missing cars or that his actions could impact the relationship CP had with its customer. He indicated that in future he would “contact the ATM with any issues” (Q/A 39; Q/A 47).

III – Arguments

[19] The Company argued the assessment of 20 demerits was an appropriate outcome, as culpability was established through the Grievor’s own statements. It argued the “core” duties of a Conductor include following work orders and building trains in a specific order as directed by the Company; that the switchlist was clear; that the Grievor failed to follow the direction of the Company; and that he instead chose to do his own thing without informing management. It argued the Grievor provided no credible explanation for his conduct and has an “unenviable” discipline record with an ongoing pattern of unacceptable work. It argued that 20 demerits was a reasonable response.

[20] The Union argued there is no evidence of misconduct and that the Investigation was not fair or impartial. It outlined several reasons, including that the Company pre-determined the Grievor’s guilt and asked numerous questions that were irrelevant, leading and self-incriminating, demonstrating impartiality; the Company took a recess in the middle of the Investigation which pre-determined guilt and violated the parties’ agreed upon process; that the Grievor was forthcoming in the Investigation and answered all questions in a straightforward manner; that the Company relied on the “one-sided” information from the ATM which fatally flawed the Investigation as the ATM resisted the Union’s legitimate questions; and that there were numerous irrelevant questions posed to the Grievor, suggesting his actions resulted in safety concerns and fell outside the scope of the Investigation. It urged the discipline should be viewed as void *ab initio*.

[21] Even if the Investigation was not flawed, the Union argued there was no prejudice or delay to the customer as they did receive cars destined to their facility, if not the “stale dated” cars that were “must spot”. It also pointed out that during the job

briefing the ATM did not mention the cars which were “must spot”. It urged 20 demerits – one third the way to dismissal under the Brown System – was excessive and unwarranted and that there was no cogent evidence of misconduct of insubordination requiring any additional spotting or re-spot of the customer’s cars, or any evidence of impact on the customer; that there was no safety rule infraction or act of insubordination from taking different cars than on his work list; or evidence the ATM wouldn’t have come to the same conclusion as the Grievor if he had been asked; that the job briefing sheet only lists “pull/spot” and not “must/spot”; that the crew was not in fact requested to spot the cars the customer wanted and that the Trainmaster did not provide a switchlist which the customer required; that running trades employees did not have information on billing and dwell times which would have made it clear how the two interact and why some cars should be spotted and others not.

[22] Even if discipline was warranted, the Union argued that there was no cause for a “punitive one third” dismissal, as there was no intentional misconduct and that the Grievor acted according to his genuine belief in the most effective course of action, so a severe penalty cannot be justified. It urged there was no “wilful insubordination” or derogation from adherence to the Company’s rules. It argued the Grievor did not consciously or deliberately commit a wrongdoing or work in a careless, reckless or inattentive manner but used his best efforts to avoid being blocked in the yard. It also argued there were mitigating circumstances not considered by the Company, including the long-service of the Grievor, the Grievors age and the quality and length of his service: **AD383; CROA 2767; 2838; 3148; 3194;3201;3342** and that he will ask the ATM in future before making a similar determination.

IV – Analysis and Decision

[23] The point of the Investigation is to ensure the allegations, facts and evidence are before the Grievor and he has the ability to respond to those allegations and offer his own rebuttal evidence: **CROA 2703**. It is a unique, fact-finding process for both parties.

[24] Reviewing the transcript as a whole, I cannot agree the Investigation was not fair and impartial or that the guilt of the Grievor was “pre-judged” as alleged or at all, or that the questions were leading or incriminating. The Investigating Officer was trying

to determine what has also been difficult for this arbitrator to understand: why the Grievor chose to spot different cars than he was instructed to do by the switchlist; why he ignored the “must spot” instructions; and why he did not discuss his perceived concerns - and his need to change the plans he was given - with the ATM before he decided to move different cars using his own judgment than those he was instructed to moved. It is also inexplicable why he failed to tell the ATM what he had done, after the fact.

[25] The Union argued the ATM did not give meaningful answers, as he stated he “stood by his memo”, yet the Grievor himself also gave this same type of answer regarding whether he had any issues with the evidence at the Investigation. His answer was: “Answered in question 9”. Like the Grievor, the ATM referred to previous information to answer a question. I cannot agree that standing by an earlier answer is “meaningless”.

[26] The Union has offered no jurisprudence that it was improper for the Company to recess and I cannot agree that such a recess is fatal to the Investigation. Depending on the Grievor’s answers, the Company may have decided to question another witness, for example, and would need a recess to determine if that witness was available. It may also have needed time to assess whether the Grievor’s answers explained his conduct. I do not find that this recess in the Investigation process was prejudicial to the Grievor or resulted in an Investigation that was fundamentally flawed. There is an ability to have a supplemental Investigation to put evidence before the Grievor. It is not clear how a recess is not similar to that ability.

[27] Turning to the merits, the analysis in *Re Wm. Scott & Co.* [1976] B.C.L.R.B.D. 98 requires that an arbitrator ask first if there was conduct deserving of discipline, and second whether the discipline imposed was just and reasonable. I am satisfied upon reviewing the facts of this case, that both questions can be answered as “yes”.

[28] First, I am satisfied the Company has met its burden to establish the Grievor’s conduct was culpable. In particular, the Grievor is guilty of three different culpable actions which serve to attract significant discipline.

[29] The first action relates to not understanding there were cars that were “must spot”, which were clearly noted on his switchlist.

- [30] The Grievor is responsible to see what was there to be seen on documents which he carries with him to direct his work. I am inescapably drawn to the conclusion the Grievor failed to read that switchlist before he folded it in half and that - had he read it first - he would have known there were certain cars subject to a "must spot" direction. Whether or not that was specifically referred to in the job briefing does not erase it from the sheet he was actually given to take with him to direct his work, which he was required to know and understand.
- [31] A failure to read instructions carefully so it is known what work must be performed is a fundamental and core part of the Grievor's role.
- [32] The Union has argued his wrongdoing was not "conscious or deliberate". I do not find that argument compelling. To fold the paper without noting its instructions first was a conscious, reckless and careless act which does not serve to excuse the Grievor's later actions.
- [33] The second culpable act is failing to follow the instructions given to spot 5 to 24 and instead using his own judgment to spot cars 1 to 20.
- [34] I cannot agree with the Union this was not a conscious or deliberate act, or that "had the Grievor known" certain information, he would have made a better decision. First, it is difficult to understand how choosing to take different cars than are on a switchlist was not a "deliberate" choice to not follow his work plan. The Grievor decided he would change the Company's directions in what cars to take, using his own judgment. Second, it is not the Grievor's job to assess the impact of taking different cars than instructed, because he is not expected to take different cars than instructed. As a long-service employee, the Grievor would have been expected to know and understand that if he is given a plan of work, he should carry out that plan of work.
- [35] It is no answer for the Union to suggest the customer didn't really request those specific cars. It is the Company's direction the Grievor is expected to follow, whatever the customer did or did not want done. It was the Company's choice to direct the work to be done in the manner it did. That decision was not the Grievor's decision to make, regardless of the difficulties he perceived were inherent in the original instructions.

- [36] The third culpable act is failing to advise the ATM he had done different work than he was instructed to do. It would have been a simple task to talk to the ATM regarding the issues the Grievor perceived in the yard and to obtain a change in instructions. Importantly, he had no explanation for why he did not do so.
- [37] In this case, the Grievor also failed to explain why he didn't tell the ATM of his change *after* he had made it, which compounded the earlier error.
- [38] I did not find it an answer to suggest that the ATM "may have come to the same conclusion" when the point is he was never given that same opportunity by the Grievor to make that determination.
- [39] The absence of any explanation for why the Grievor failed to discuss his assumption that he had a better plan with the ATM, whose job it was to give him the instructions in the first place, causes his assurances to check with the ATM in the future to ring somewhat hollow.
- [40] The Union has argued the Grievor was not reckless, careless or insubordinate. I cannot agree with that conclusion. I am satisfied the Grievor was all three. First, the Grievor was reckless and careless in not reading the instructions for his work – where he would have seen the "must spot" notation – and he was insubordinate when he failed to follow instructions to move certain cars, which is conduct worthy of significant discipline.
- [41] Turning to the reasonableness of the discipline, failing to follow instructions; substituting your own judgment for the work to be done; and failing to tell the Company you have done so, are serious offences. It demonstrates a level of disregard for direction and deliberate insubordination that is surprising in a long-serving employee.
- [42] Unlike several of the precedents relied upon by the Union, the Grievor's disciplinary record is poor. Just looking at the last five years – between 2016 and January of 2021 the Grievor was disciplined multiple times. While several are under grievance, others are not, including 2, 7, 14, and 30 day suspensions.
- [43] The only mitigating factor in this case is the Grievor's long service. While I agree that is a significant factor, it is the only one. This is not a case where a long-serving

grievor has extended periods of time of good service. Since 2016 – over the most recent part of his record – the Grievor’s discipline record has deteriorated.

[44] While 20 demerits is significant – as it is one-third of the way to dismissal under the Brown System - I am satisfied that 20 demerits is justified as a reasonable progression for the Grievor for not knowing there were “must spot” cars on his checklist; for not spotting the cars that were “must spot”; for not taking the cars he was instructed to take; for relying on his own judgment instead of the Company’s direction to take different cars; and for failing to advise the ATM of what he did when he chose not to follow what he was directed to do.

[45] Discipline was warranted and the penalty imposed was just and reasonable in all of the circumstances.

[46] The Grievance is dismissed.

I remain seized to address any issues with the implementation of this Award and to correct any errors or omissions to give it the intended effect.

October 20, 2023



**CHERYL YNGST BARTEL
ARBITRATOR**